Court, U.S.
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Docket No. 04 501 AUG 2 2004

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

BEVERLY HEADSPETH, PETITIONER

V.

STATE OF GEORGIA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Please Serve:

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BEST AVAILABLE COPY

QUESTION PRESENTED:

WHETHER A STATE STATUTE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD WHEN IT IS USED BY THE GOVERNMENT TO CHARGE THE BIOLOGICAL GRANDMOTHER WITH THE DEATH OF HER GRANDDAUGHTER BECAUSE SHE LEFT HER HOME WITH HER SON FOR LESS THAN THREE HOURS.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as *State v. Beverly Headspeth*, A03A2494. A copy of this opinion is attached as Appendix "A," to this petition.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on January 26, 2004. This court has jurisdiction pursuant to United States Supreme Court Rule 12&13, over this matter as it is an appeal from the denial of the Georgia Supreme Court to exercise discretionary review of a holding of the Georgia Court of Appeals. The Georgia Supreme Court entered its order on May 3, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of

life, liberty, or property, without due process of law.

STATEMENT

Beverly Headspeth, the petitioner, is the grandmother of Alexis, Brianna, Erica and Demetrius Headspeth. She is also the mother of John Headspeth. She was left to care for her grandchildren due to her daughter, Shannell Headspeth's incarceration. The children had no other place to go. As testified to by Necola Chaney in response to the State Prosecutor's question "When did they come to live with Beverly Headspeth?""When the girl who had them on Pine street dropped them off with someone else in a car one afternoon on the porch." (T. 2. 227).

On or about July 29, 2002, Erica Headspeth was suffering from Chicken Pox. Beverly Headspeth, who was eventually charged with the death of Alexis Headspeth for leaving her home alone with John Headspeth, had a choice to make. She could either leave Alexis momentarily with John or allow Erica to continue suffering from the Chicken Pox. Although leaving Alexis with John would violate an agreement with DFACS, medicine would save Erica from continued suffering.

Since the agreement was based upon John being to young to care as opposed to him being violate, she chose to ease Erica's pain. There was never any evidence of substantial negligence on the part of Beverly or violence exhibited by John towards the children and documented by DFACS. It was for this reason that

DFACS left them in the care of Beverly.

Daisy Mitchell the DFACS case worker testified that the children looked healthy and never looked like they were not eating on June 24, 2002;(T. 4. 672); that Beverly Headspeth moved her bed into the middle of the floor due to the additional responsibilities of taking on her grandchildren, (T. 4. 673); that she was planning to move from the small house by the first of August, (T. 5. 699); that Alexis and Demetrius were playing with John, (T. 5. 699); that the children were appropriately dressed on June 5, 2002, (T. 5. 699); that there was nothing unusual about the children's appearance or behavior on June 5, 2002, (T. 5. 699); in fact the Case Worker testified that she could not determine on June 5, 2002, the basis for the case being considered "substantiated." (T. 5. 700).

Rebecca Sims testified that in response to a request by Beverly, she drove her to the CVS and purchased Calamine lotion for Erica's chicken pox, (T. 3. 401); that Erica was suffering from Chicken Pox, i.e., "it appeared to be chicken pox, that's what it looked like to me." (T. 3. 395); and that Erica appeared to have a fever, i.e., "... that's the way she felt to me." (T. 3. 395).

When Beverly returned home she found Alexis in the bathroom, almost unconscious. She rushed out of her home "hollering" with Alexis in her arms and yelled for Rebecca Sims to call the ambulance. (T. 3. 403).

As paramedics from the East Point Fire Department arrived, Alexis was conscious. Kelwin Lockhart testified he and Frank Smith "... found [Alexis] a three-year-old patient being held by her Grandmother

outside the residence in front of the door, on the porch" (T. 3. 408); that she, Alexis, was "breathing" on her own, "so we didn't have to administer CPR." (T. 3. 409). And as they turned Alexis over to the ambulance paramedics "... Her vital signs were picking up..."(T. 3. 412). Frankie Smith would testify that "... her breath sounds were clear. What I mean clear, she was passing air... it wasn't like she was choking on anything." (T. 3. 421). Beverly rode with the Ambulance to the hospital. (T. 3. 426).

The Ambulance paramedic, Rennie Scott, would next testify to Alexis level of alertness, specifically, "... she seemed alert at that point ..." (T. 3. 427) and "... she was looking around and making noise." (T. 3. 428). And in response to repeated questioning, e.g., " And was the patient alert?" answered "at the time of my arrival, yes" (T. 3. 428) and "when the EMT carried her out from the house her eyes were open, she was looking around. I don't remember her crying per se, but she was not unconscious, unresponsive. She was conscious and alert. It's hard to judge orientation on a three-year-old but she was alert." (T. 3. 430). "Her head was moving?""Yes""Were her pupils moving?""When I checked them, yes.""And was she saying anything?""I don't remember, per se, if she said any actual words, but she was, you know making sounds." (T. 3. 431). Although Alexis would suffer periods of brief unresponsiveness, the paramedic eventually raised her oxygen level to 94% (T. 3. 437)

As she, Alexis Headspeth, arrived at the hospital she was conscious. Alexis arrived at 1830 or 6:30 p.m. according to Dr. McCrory, the attending physician, i.e.,

"that's 6:30 [p.m.], right?""Yes"(T. 3. 519)

She was able to "sit up" and appeared to be aware of her grandmother's presence.

As Alexis was taken for a CAT SCAN, a procedure was begun which was suppose to improve her ability to breath called "intubation." Shortly after the procedure was begun, Alexis fell into arrest, stopped breathing and was transported to the intensive care. Dr. McCrory testified that little over and hour after arrival or 8:00 p.m. the intubation procedure was performed.

Eventually the effects of this failed intubation procedure took effect as Alexis suffered brain death.

Dr. Mcrory recommend taking her, Alexis Headspeth, off the respirator, the mother, Shannel Headspeth agreed and the child died. (T. 3. 516-517)

REASON FOR GRANTING THE WRIT:

To begin, the Georgia Court of Appeals misstated the harm caused by the failure to grant the Petitioner's demurrer. The Manslaughter charged was based upon the Petitioner having committed the criminal offense of reckless conduct. Thus if the trial court had granted the demurrer and found the reckless conduct statute, (16-5-60) unconstitutional then it would have been required to dismiss the Manslaughter count as well.

The vagueness and overbreath of 16-5-60 is a violation of the Due Process Clause of the Fifth Amendment of the United States Constitution*(U.S. CONST. amend. V)* which is made applicable to the States through the Fourteenth Amendment*(U.S. CONST. amend. 14)* of the United States Constitution.

This statute as enacted and specifically the requisite paragraph of 16-5-60(b) –"... by consciously

disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would in the situation...,"is vague and overbroad, not to mention the fact that the terms, specifically, "act,""omission," "endanger," "the other person," "the disregard," and "gross deviation" are not defined. Equally unclear is the use of the legal concepts: causation-("will cause,"), "standard of care," and "reasonable person".

A criminal statute must set sufficiently definite standards for those who are assigned the duty to enforce it so that basic policy matters are not impermissibly delegated to prosecutors, police, judges and juries for resolution on ad hoc and subjective basis with attendant dangers of arbitrary and discriminatory application. *Roemhild v. State*, 251 Ga. 569 (1983).

The statute leaves too much discretion in the hands of the State when charging one with a violation. There is no language defining the age and circumstance of a "reasonable person." Is it a fireman or police officer with twenty years of experience? Or perhaps a surgical nurse or physician. The statute fails to include the phrase "of ordinary intelligence," when referring to the reasonable person standard.

So that, one could be charged for endangering the welfare of an unborn child and the mother by failing to immediately transport them to the hospital? Since no standard is set, a gynecologist would certainly recognize the onset of labor and transport the mother and child where a person of ordinary intelligence might wait,

unaware of the symptoms, which would be conspicuous to a physician or midwife exercising reasonable care, and thereby cause the death of the infant and perhaps the mother in an ectopic pregnancy.

The fact that the person was "unaware" would be of no effect. The Fulton District Attorney could still charge this person with reckless conduct or involuntary manslaughter, assuming the child died, by alleging that this bad Samaritan failed to transport the mother before her fallopian tube burst and that such a failure constituted a gross deviation from that of a reasonable person .

In short, the statute provides no guidance. There are no definitions, leaving more than six (6) terms and three (3) legal concepts undefined. There are more ways to charge one with a crime based upon seemingly innocent conduct then can be noted in this paper.

In the case at hand, the overbreath of the statute is clear upon the face of the indictment – "...Beverly Headspeth ... did endanger the bodily safety of Alexis Headspeth by ... disregarding [the] substantial and unjustifiable risk ...[of leaving her with] ... an eleven year old boy..." In short, Defendant is charged with reckless conduct not to mention involuntary manslaughter because she allegedly left the child with an 11 year old, nothing more is alleged, not even duration of the stay. Therefore the gross deviation is based simply on the age of the custodian, here, 11. Parents leave children in the custody of other children all the time: to run to the store, to go into another room to accept a phone call, to play in the back yard, to go swimming, and to play board games such as Monopoly, Candy land and

Chinese Checkers. The point is charging a Georgia Citizen with a crime based upon the fact that she did not constantly keep watch is using the language of the statute to make new law.

According to the District Attorney, it is now a crime under16-5-60 to leave your child with an 11 year old boy for thirty (30) minutes or fifteen (15) minutes or perhaps ten (10). Same is a violation of due process.

CONCLUSION

For all of the reasons stated above Petitioner moves this Court to reverse the decision of the Georgia Court of Appeals.

Respectfully submitted

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Docket No._____

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APPENDIX "A"

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IN THE COURT OF APPEALS FOR GEORGIA

A03A2494 , HEADSPETH V. STATE

January 26, 2004

MILLER, JUDGE

Beverly Headspeth was convicted of the involuntary manslaughter of a three- year-old child left in her care. She was also convicted of reckless conduct, contributing to the deprivation of a minor, and four counts of cruelty to children. Headspeth appeals, citing several enumerations of error. Upon review, we see no error and affirm.

Viewed in the light most favorable to the verdict, the evidence showed that four children were left in Headspeth's care after their mother Headspeth's daughter, was incarcerated. One evening Headspeth left three of the children in the care of her own son. J. H.. who was then 11 years old. J. H. drowned three-year-old A. H. in the bathtub while Headspeth was away. There was also evidence that Headspeth's boyfriend (who was also charged with cruelty to children) beat the children with a belt in Headspeth's presence.

In her first enumeration, Headspeth contends that the court erred in denying her demurrer to the indictment. She contends that Count) (reckless conduct) of the indictment is unconstitutionally vague as it failed to give her sufficient notice that her conduct constituted a crime.

Assuming but not deciding that the court erred

in denying Headspeth's motion, we note that Count 2 was merged into Count 1 (involuntary manslaughter) for sentencing purposes; thus, Headspeth is unable to demonstrate any harm resulting from the court's denial. See *Jackson v State*, 251 Ga. App. 781, 785 (3) (555 SE2d 136) (2001); *Bolick v State*, 244 Ga. App. 567, 572 (1) (fl (ii) (536 SE2d 242)(2000). "It is axiomatic that harm as well as error must be shown to authorize a reversal by this court" (Footnote and punctuation omitted.) *Buckalew v. State*, 249 Ga. App. 134, 136-131 (2) (547 SE2d 355) (2001).

2. In her second enumeration, Headspeth contends that the trial court erred in failing to excuse a juror for cause. In response to defense counsel's questioning, a venire member stated that she could not bear to listen to any testimony that involved the mistreatment of a child. Defense counsel then asked the potential juror as to whether she would still have those feelings if the judge gave her certain instructions.

She responded ''I really honestly don't know how I would react. I would certainly try to listen to the facts, and I'm pretty good at that, but, I don't know.'

Whether to strike a potential juror for cause is a matter addressed to the sound discretion of the trial court. *Torres v. State*, 253 Ga. App.318..319-320 (2) (558 SE2d 850) (2002). A trial court is not required to strike a potential juror for cause who simply questions her impartiality or expresses reservations about her ability to set aside personal experiences. *Anderson v. State*, 276 Ga. 389, 390 (21 (578 SE2d 890)(2003). Here, the potential juror was not unalterably prejudiced against Headspeth, but "simply expressed empathy for

the victims regardless of who perpetrated the crime against them." Id. Therefore, we hold that the trial court did not abuse its discretion in refusing the strike the juror for cause.

3. Headspeth argues in her third enumeration of error that the court erred in allowing a juror to remain on the jury after the juror admitted that he had heard that Headspeth's bond had been revoked. She argues that the juror violated the trial court's instruction not to discuss the case with anyone.

Unbeknownst to the jury. Headspeth 's bond was revoked during trial. The following day, the court asked the jurors whether they had heard any information regarding the bond revocation. One juror responded that he had heard such information, and outside of the presence of the jury, explained that his wife had told him that "the lady' had to go back to jail because something was in a glass case, and that all I heard."

Any potential harm here was cured, however, as (1) the juror stated that he could put what he had heard aside and that the information did not affect him in any way. (2) there was no evidence that the juror shared this information with the other
jury members, and (3) the court instructed the jury that it could not consider anything it heard outside of court as such information was not evidence. See *Fulcher v. State*, 259 Ga. App. 648,651(4) (578 SE2d 264) (2003); cf. *Boles v State*, 168 Ga. App. 904, 901-908 (2) (310 SE2d 741) (1983). Thus, we cannot conclude that any alleged juror misconduct was so prejudicial as to deny Headspeth due process.

4. In her fourth enumeration. Headspeth argues

that the trial court erred in denying her motion for directed verdict on child cruelty because the State failed to show beyond a reasonable doubt that Headspeth's boyfriend was a parent, guardian, or caregiver charged with the care of the children. More specifically, she argues that she could not be convicted as a party to the crime of cruelty to children where there was no evidence that her boyfriend was a guardian of the children.

Headspeth's argument is misguided. The indictment charged her with cruelty to children in the first degree for wilfully and maliciously causing excessive physical and mental pain to the children by beating them with a belt. These counts of the indictment miror the language of OCGA § 16-5-70(b), which (unlike OCGA 16-5-70 (a)) does not require that the perpetrator be a parent or guardian of the child. Thus, this argument is without merit, and the trial court correctly denied the motion for directed verdict on this ground.

5. In her fifth enumeration of error, Headspeth contends that the trial court erred in failing to give a jury instruction on how to find her not guilty, and in failing to send out with the jury the form reflecting such instruction. The court instructed the jury that if it "should find and believe beyond a reasonable doubt that the defendants did . . . commit the offenses as alleged in the indictment, [it] would be authorized to find [them] guilty." The court further instructed the jury that "[i]f you find that both the defendants are not guilty on all counts, then that would terminate your consideration of the indictment, and in such event, the form of your verdict would be: we, the jury, find the

defendants not guilty"

Considering the charge as a whole, we conclude that the trial court adequately apprised the jury of its duty to acquit Headspeth in the event that it did not find her guilty beyond a reasonable doubt. See *Stansell v. State*, 270 Ga. 147, 150-151 (4)(510 SE2d 292) (1998).

Judgment affirmed. Smith, C. J., and Ruffin P. J., concur.

SUPREME COURT OF THE STATE OF GEORGIA
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DATE: May 3, 2004

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Case No. S04C0949

BEVERLY HEADSPETH V. THE STATE

COURT OF APPEALS CASE NO. A03A2494

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk